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IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1983

82-6933

MARION ALBERT PRUETT,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

BILL ALLAIN, ATTORNEY GENERAL
STATE OF MISSISSIPPI

BY: WILLIAM S. BOYD, III
SPECIAL ASSISTANT ATTORNEY GENERAL

and

BY: BILL PATTERSON
SPECIAL ASSISTANT ATTORNEY GENERAL

OF COUNSEL

Post Office Box 220
Jackson, Mississippi 39205
(601) 359-3680

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QUESTIONS PRESENTED

I.

Whether petition may raise the issue of whether Mississippi's assertion of jurisdiction over a capital murder beginning in Mississippi and ending in Alabama contravened the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, when such a claim was not presented to the Mississippi trial or appellate courts?

II.

Whether the allegedly constitutionally impermissible occurrences during the sentencing phase of petitioner's bifurcated trial which were not raised as issues on appeal, much less questioned based upon their supposed violation of the United States Constitution, have been properly preserved for review by this Court at this time?

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OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported as Marion Albert Pruett v. State of Mississippi, 431 So.2d 1101 (Miss. 1983). Rehearing was denied on March 16, 1983. A copy of the opinion affirming conviction and sentence is before this Court as Appendix 13 to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of Petition for Writ of Certiorari through the authority of 28 U.S.C. 1257(3) and Rule 17 of the United States Supreme Court Rules.

STATEMENT OF THE CASE

Marion Albert Pruett was indicted, tried and convicted for the capital murder of Peggy Lowe whon he kidnapped after robbing the Metrocenter Branch of Unifirst Savings and Loan,

Jackson, Mississippi, and then shot after crossing into the State of Alabama. Following his conviction at the close of the guilt phase of the trial, a separate sentencing phase of the trial was conducted after which he was sentenced to die by means of lethal gas. On automatic appeal to the Mississippi Supreme Court, conviction and sentence were affirmed by a majority of the Court on February 23, 1983, and an execution date of April 13, 1983, was decreed. Timely petition for rehearing was filed by petitioner's trial and appellate counsel and denied on March 16, 1983. A stay of execution pending timely filing of this petition was granted by this honorable Court on April 8, 1983.

The facts of the kidnapping-killing, as found by the Mississippi Supreme Court, follow:

> The facts of the crime are practically admitted in their entirety, except for one instance; that is, the events immediately prior to appellant shooting the deceased, Peggy Lowe. All underlying occurrences were testified to by appellant as his only witness during the guilt phase of the trial. There is no contention or indication that Pruett was mentally incompetent. In fact, the entire record and history of this particular case, as well as Pruett's prior activities, clearly reveal that he is a very intelligent and crafty person. The circumstances leading to the death of Peggy Lowe were clearly revealed by appellant's sworn testimony at the trial. Early on the morning of September 17, 1981, appellant appeared at the branch office of Unifirst Savings & Loan Association located in the Metrocenter shopping area where Peggy Lowe worked with three other female employees. According to appellant, he picked out this business because no male employees were present, stating that men would be more likely to give him trouble than women. Appellant had stayed the prior night at a motel not very far from the area. The purpose of appellant entering the savings and loan association branch office admittedly was to commit an armed robbery and to

take a hostage for the purpose of making his escape. During the progress of the armed robbery, Mrs. Lowe received a call from her son and made an engagement to meet him for lunch. Appellant decided that it would suit his purposes better to take Mrs. Lowe as hostage rather than the other person originally selected.

The armed appellant then took the money and Peggy Lowe to her car and drove to another part of the shopping center. He then placed her in his car, drove around several streets in the area, and then drove to Interstate #20 and approximately 100 miles, without stopping, to Sumter County, Alabama. This county is adjacent to the Mississippi-Alabama state lines. During this entire ride appellant forced Mrs. Lowe to stay on her knees on the floorboard of the passenger front of the car, with her shoulders, arms and head downward on the seat. Whenever passing another vehicle or being passed, appellant would place his coat over Mrs. Lowe so she would not be seen. At one point during the ride, at the request of Mrs. Lowe, appellant permitted her to say a prayer.

After driving into Alabama, appellant left the interstate highway, traveled on a gravel road for a distance and then turned onto a small country road where he stopped. Mrs. Lowe was taken from the car and carried into the woods. According to appellant, he then forced her to disrobe, except for her underclothes. The purpose of this was to keep her under his control so that she would not leave the area. Appellant testified he then went to his car, took a shot of cocaine and went back to check on his prisoner. He found that she had moved from the area. He then, by his own sworn testimony, instructed her to get on her knees, put her face down and repeat her husband's telephone number so that he could be called. Mrs. Lowe was in the process of doing this when appellant, according to his sworn testimony, shot her in the back of the head at close range. Appellant then drove away in his car and visited other parts of the country prior to being apprehended.

(411 So.2d at 1103).

REASONS FOR DENYING THE WRIT

I. Neither at trial nor on appeal did Petitioner raise the issue of whether Mississippi's claim of jurisdiction over a capital murder beginning in Mississippi and ending in Alabama contravened the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and, accordingly, he is precluded from raising this ground at this juncture.

In his Petition for a Writ of Certiorari to this court, petitioner raises for the first time his claim that Mississippi's assertion of jurisdiction over a capital murder beginning in Mississippi and ending in Alabama is somehow violative of the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. The all important fact is that this issue was not raised either at trial, in the Circuit Court of Hinds County, Mississippi, or on appeal to the Mississippi Supreme Court. To be sure, this claim of a lack of jurisdiction over a crime occurring partly in one state and partly in another was explored both in a Motion to Quash the Indictment filed with the aforestated circuit court, and on direct appeal to the Mississippi Supreme Court. However, in neither case was this issue cloaked in the constitutional terms now presented to the Court. It is the State's position that such a failure to allege these constitutional ramifications of the assertion of jurisdiction necessarily precludes their presentment to this court by way of a Petition for a Writ of Certiorari.

More than ample caselaw supports the State in its contention. See: Illinois v. Gates, 51 L.W. 4709 (1983); Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981); Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969); Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed.2d 398 (1969).

Respondent would first ask that the Court note that the burden of stating where and when an alleged constitutional issue was presented is upon the Petitioner. To quote from Webb, 451 U.S. at 495, 101 S.Ct. at 1891, 68 L.Ed.2d at 396:

> "Our Rule 21.1(h) requires the petitioner to "specify the stage in the proceedings, both in the court of the first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court."

In the instant situation no such specification was made and with good reason; the issue was never broached at the State Circuit Court trial or on direct appeal to the State Supreme Court.

It has long been the rule that state courts must at least be afforded an opportunity to rule on questions of a constitutional magnitude. Cardinale v. Louisiana, makes this quite clear.

> It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In Crowell v. Randell, 10 Pet. 368, 9 L.Ed. 458 (1836), Justice Story reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch 344, 3 L.Ed. 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c 20, §25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. "If both of these do not appear on the record, the appellate jurisdiction fails." 10 Pet. 368, 391, 9 L.Ed. 458, 467. The Court was

> consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion, Miller v. Nicholls, 4 Wheat 311, 315, 4 L.Ed. 578, 579 (1819), and since. . . .
>
> (394 U.S. at 438, 89 S.ct. at 1162, 1163, 22 L.Ed.2d at 400).

Of course, the question has also arisen as to what will suffice as "sufficient presentation" of such a constitutional issue. In Bryant v. Zimmerman, 278 U.S. 63, 49 S.Ct. 61, 73 L.Ed.2d 184 (1928), by way of Street v. New York it was stated thusly:

> Insofar as the question of sufficient presentation is one for our independent decision, the controlling principle was set forth in the leading case of New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67, 73 L.Ed. 184, 187, 49 S.Ct. 61, 62 ALR 785 (1928):
>
> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."
>
> (394 U.S. at 584, 89 S.Ct. at 1361, 1362, 22 L.Ed.2d at 580).

The State can say in all certainty that the constitutional ramifications now argued by petitioner were not presented at either the state trial or direct appellate level.

Also notable is that this rule is not one of antiquity lingering with no sound modern day reasoning as support. In again turning to the Cardinale decision for the rationale:

> In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. §1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not complied with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, O'Connor v. Ohio, 385 U.S. 92, 17 L.Ed.2d 189, 87 S.Ct. 252 (1966), they should be given the first opportunity to consider them.

(394 U.S. at 439, 89 S.Ct. at 1163, 22 L.Ed.2d at 400,401).

Though similar sentiments are echoed in Webb v. Webb, they are more fully developed.

> In the first place, although the States are soverign entities, they are bound along with their officials, including their judges, by the Constitution and the federal statutory law. Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements. As the Court has elsewhere observed, this principle of comity requires
>
> > "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate

ways." Younger v. Harris, 401 U.S. 37, 44, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971).

The principle of comity that stands behind the "properly-raised-federal-question" doctrine is similar to the principle that stands behind the exhaustion-of-state-remedies doctrine applicable to federal habeas corpus review of the constitutional claims of state prisoners. We have described the latter doctrine as one based on "federal-state comity," Picard v. Connor, 404 U.S. 270, 275, 30 L.Ed.2d 438, 92 S.Ct. 509 (1971), and have described its function as reflecting:

"'(A)n accomodation of our federal system designed to give the State the initial "opportunity to pass upon and correct" alleged violations of its prisoners' federal rights.' We have consistently adhered to this federal policy, for 'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation.'" Ibid. (citations omitted).

There are also very practical reasons for insisting that federal issues be presented first in the state-court system. The requirement affords the parties the opportunity to develop the record necessary for adjudicating the issue. It permits the state courts to exercise their authority, which federal courts, including this one, do not have at least to the same extent, to construe state statutes so as to avoid or obviate federal constitutional challenges such as vagueness and overbreadth. The rule also insures that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner. Finally, if the parties to state-court litigation are required to present their federal claims in the state tribunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case. In most instances, such a judgment will be supported by an opinion that may well obviate any reason for our giving plenary consideration to the case. In terms of our own workload, this is a very substantial matter.

(451 U.S. at 499-501, 101 S.Ct. at 1392, 1393, 68 L.Ed.2d at 398, 399).

Thus, it is infinitely clear that the rule precluding review of a constitutional issue, not first presented to a state court system, is grounded in sound reasoning.

Having stated with clarity and certainty that the issue now argued by the petitioner has not been properly preserved for this Court's review at this juncture, Respondent will not engage in a discussion of the merits concerning the State Circuit Court's assertion of jurisdiction. Rather, it will rest on the aforestated argument in arguing that the Court deny the relief sought by the Petitioner.

II. The allegedly constitutionally impermissible occurrences during the sentencing phase of Petitioner's bifurcated trial were not raised as issues on appeal, much less questioned based upon their supposed violation of the United States Constitution, and, therefore, they have not been properly preserved for review by this Court at this time.

Petitioner cites numerous instances during the sentencing phase of his trial which he claims violated both the Eighth and Fourteenth Amendments to the United States Constitution. Recitation of the individual claims would be useless given the tack to be utilized by the State in response.

In the instant situation none of the allegations made by the petitioner were raised on direct appeal to the Mississippi Supreme Court. Neither were these supposedly prejudicial instances questioned on separate and district state law grounds, nor were they attacked on the basis of their constitutional impermissiveness. In short, they were not raised at all.

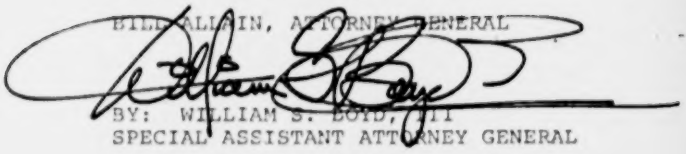
Rather than resurrecting and reconstructing the argument made in Respondent's reply to the first ground raised by the petitioner, the State would adopt it in its entirety and apply it herein as well. Stated briefly, petitioner's failure to initially present such constitutional claims to the state trial and appellate courts necessarily precludes him from arguing them to this Court through the vehicle of a Petition for Writ of Certiorari. Thus, the record of petitioner's grounds can in no way form the basis for the relief he seeks.

CONCLUSION

The State urges that the Petition in this case be denied.

Respectfully submitted,

BILL ALLAIN, ATTORNEY GENERAL



BY: WILLIAM S. BOYD, III
SPECIAL ASSISTANT ATTORNEY GENERAL

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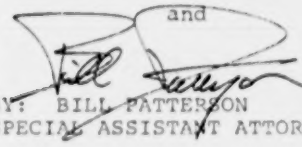

BY: BILL PATTERSON
SPECIAL ASSISTANT ATTORNEY GENERAL

OF COUNSEL

Post Office Box 220
Jackson, Mississippi 39205
(601) 359-3680

CERTIFICATE

I, Bill Patterson, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the above and foregoing BRIEF IN OPPOSITION to the Honorable Stephen B. Bright, Suite 600, Healey Building, 57 Forsyth Street, N.W., Atlanta, Georgia 30303.

This, the the 31st day of August, A. D., 1983.

SPECIAL ASSISTANT ATTORNEY GENERAL